A

LAI TED KONG

v.

MENTERI KEWANGAN

B

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[JUDICIAL REVISION NO: R1-25-29-2004]
10 FEBRUARY 2009

C ***CUSTOMS AND EXCISE:*** *Service tax - Taxable person - Criteria for determining whether 'taxable person' - Service Tax Regulations 1975 Group C Schedule 2 - Whether applicant carrying on canteen business - Whether applicant a 'taxable person' under Group C*

D ***REVENUE:*** *Service tax - Taxable person - Criteria for determining whether 'taxable person' - Service Tax Regulations 1975 Group C Schedule 2 - Whether applicant carrying on canteen business - Whether applicant a 'taxable person' under Group C*

Apollo Catering ("Apollo") was hired as a contractor to cook food
E for Samling's workers three (3) times a day at premises owned by Samling using facilities and utensils provided by Samling. A place was set aside in the factory owned by Samling for Samling's workers to have their meals. This eating place in the factory was not open to the public and was the place where Samling's
F workers had their breakfast, lunch and dinner. At the end of every month, Apollo Catering will send Samling an invoice stating the cost for buying the ingredients and cooking the food for Samling's workers. The Customs took the view that the services provided by Apollo came under Group C, Schedule 2 of the Service Tax
G Regulations 1975 ("the Regulations") and should be subject to tax under the Service Tax 1975 (Act 151) ("the Act"). Apollo's appeal against this decision was rejected by the respondent. Apollo moved the court, *inter alia*, for an order of *certiorari* to quash the decision of the respondent. The issue arising was whether Apollo
H was a "taxable person" under Group C of the Second Schedule of the regulations so as to be subject to service tax.

Held (dismissing the application with costs):

I **(1)** A "taxable person" under Group C of the Second Schedule of the regulations is: (i) any person operating; (ii) (a) one or more restaurants, bars, snack-bars, coffee-houses; or (b) places which provide food, drinks, or tobacco products, whether

wholly eat-in or partly take-away, (c) a food court as defined in reg. 2 of the regulations; (iii) where the total annual sales turnover of any one or more taxable services mentioned in Group C whether combined or singly exceeded RM500,000; and (iv) all the aforesaid persons as described have to be located outside a hotel. The two categories excluded as a "taxable person" are when a person is operating a canteen located in an educational institution or a canteen operated by a religious institution or body. (para 12)

(2) The amount charged by Apollo to Samling at the end of each month differed. If Apollo was hired as a contractor to cook food for Samling's workers, surely the contract sum would be a fixed contract sum. The fact that the amount charged monthly varied, was more consistent with the respondent's contention that Apollo was carrying on the business of a canteen providing food and drink. The respondent had shown that Apollo came within the purview of "taxable person" under Group C in the Second Schedule. (para 16)

(3) There was no merit with respect to Apollo's contentions that the respondent had acted in excess of jurisdiction or acted unreasonably in the "*Wednesbury*" sense. (para 17)

Case(s) referred to:

Controller of Income Tax, States of Malaya v. HKV [1968] 2 MLJ 260 ***(refd)***

Humes Ltd v. The Comptroller of Income Tax Singapore [1952] 12 MLJ 245 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. South Eastern Oceanic Drilling Co SA [1997] MLJU 105 ***(refd)***

National Land Finance Co-Operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 53 r. 3(2)
Service Tax Act 1975, ss. 2, 3, 8, 9(1)
Service Tax Regulations 1975, regs. 2, 3, Schedule 2

Other source(s) referred to:

The New Shorter Oxford English Dictionary, vol 2, p 2005

For the applicant - KI Goh; M/s Shearn Delamore & Co
For the respondent - Saidah Mohd Halil, Legal Department Royal Malaysian Customs

Reported by Amutha Suppayah

A

JUDGMENT

Lau Bee Lan J:

Background

B **[1]** The applicant has obtained leave of the court on 18 May 2004 to move the court for:

(a) an order of *certiorari* to quash the decision of the respondent dated 17 December 2003 addressed to Apollo Catering which
C was received by KPMG Tax Services Sdn Bhd ("KPMG") on behalf of Apollo Catering on 21 January 2004, whereby the respondent decided that the services provided by Apollo Catering to Samling Flooring Sdn. Bhd and Samling Fibre Sdn Bhd ("Samling") are liable to service tax under the Service Tax
D Act 1975 (Act 151) ("the Act");

(b) a declaration that the respondent's decision is erroneous in law and that the services are not liable to service tax under the Act;

E (c) an order of prohibition to prohibit the respondent from making demands or taking any steps to enforce or implement the respondent's decision or any similar decision or findings of the respondent; and

F (d) an order of *mandamus* to compel the respondent to refund to the applicant the service tax and penalty amounting to RM4,435.62 which was paid under protest to the Director-General of Customs.

G **[2]** The application of the applicant is supported by altogether six affidavits (encls. 3, 4, 5, 7, 21 and 30), of which two are corrective affidavits (encls. 5 and 7) and opposed by the respondent through the affidavit of Azizah binti Ibrahim affirmed on 30 March 2006 (encl. 19).

H **[3]** The facts leading to the commencement of the judicial review application by the applicant against the respondent are as follows. Briefly, *vide* a letter dated 16 September 2002 (exh. LTK2) the Customs HQ wrote to the Customs Miri that the services provided by Apollo Catering, Apollo Enterprise and Apollo Food
I Supply came under Group C, Schedule 2 of the Service Tax Regulations 1975 ("the regulations") and should be subject to tax

under the Act. *Vide* a letter dated 30 October 2002 (exh. LTK3), KPMG, acting on behalf of Apollo Catering, Apollo Enterprise and Apollo Food Supply wrote to the DG of Customs to appeal against the Customs HQ's decision. *Vide* a notice of demand dated 29 November 2002 (exh. LTK4) Customs Miri wrote to Apollo Catering for the period from 1 October 1999 to 31 December 2001. By a letter dated 14 January 2003 (exh. LTK8) the DG of Customs wrote to KPMG that the appeal *vide* their letter (exh. LTK3) was rejected and the decision in exh. LTK2 stood and that any further appeal was to be made to the respondent. By a notice of demand dated 28 January 2003 (exh. LTK9), Customs Miri wrote to Apollo Catering demanding for payment of service tax and penalties for the period from 1 January 2002 to 31 August 2002 whereby KPMG, on behalf of Apollo Catering, Apollo Enterprise and Apollo Food Supply appealed against the DG's decision (exh. LTK8) and to request for stand-over of the demands for payment in exhs. LTK4 and LTK9 *vide* letters dated 14 February 2003 and 12 March 2003 respectively (exhs. LTK10 and LTK11). There were an exchange of correspondences relating to Apollo Catering's request for payment by installment until finally the respondent's decision *vide* letter dated 17 December 2003 (exh. LTK16) stating that Apollo Catering's appeal in exh. LTK11 had been rejected and that the services provided by Apollo Catering to Samling were subject to service tax under the provisions of Group C, Schedule 2 of the regulations was received by KPMG on 21 January 2004. As at 27 February 2004 Apollo Catering had paid service tax and penalties amounting to RM4,435.62 as per receipts exhs. LTK17(a), (b) and (c).

[4] The respondent stated that the grounds in support of the application are contained in the statement filed pursuant to O. 53 r. 3(2) of the Rules of the High Court 1980 ("the RHC") (encl. 2). Although the said statement contained several grounds of challenge, based on the applicant's submission in reply (encl. 35) the applicant's two (2) grounds of challenge are:

(i) the respondent acted in excess of jurisdiction/powers contained in the Act in arriving at the respondent's decision; and

(ii) the respondent acted unreasonably in a way that no other reasonable public, administrative or statutory body in the same circumstances would have so acted and, as a result, tainting the respondent's decision with *Wednesbury* unreasonableness.

[5] In my view both these grounds revolve around the issue of whether the applicant is a "taxable person" carrying on the business of providing taxable service pursuant to Group C of the Second Schedule of the regulations so as to be subject to service tax.

[6] Based on the affidavits of the applicant the relevant facts which the applicant are relying on for the purpose of the judicial review application briefly are:

(i) Apollo Catering was hired as a contractor to cook food for Samling's workers three (3) times a day at premises owned by Samling using facilities and utensils provided by Samling.

(ii) A place was set aside in the factory owned by Samling for Samling's workers to have their meals.

(iii) This eating place in the factory was not open to the public and was the place where Samling's workers had their breakfast, lunch and dinner.

(iv) Apollo Catering took instructions from Samling on what to buy and how much to cook for Samling's workers.

(v) At the end of every month, Apollo Catering will send Samling an invoice stating the cost for buying the ingredients and cooking the food for Samling's workers.

(vi) Samling paid Apollo Catering RM4.50 per person per day for buying food and cooking three meals a day.

(vii) Samling's workers did not pay Apollo Catering for the food consumed by them at the eating place.

(viii) Apollo Catering did not own or manage the eating place in the factory, which was owned and managed by Samling.

(ix) All the tables, chairs, crockery, kitchen and eating utensils provided at the eating place are owned by Samling.

(x) The electricity and water bills for the eating place were paid by Samling.

[7] Based on the sole affidavit of the respondent, before making the respondent's decision, the respondent stated it has "menimbangkan semua pilihan yang ada berdasarkan alasan rayuan pemohon dan fakta kes yang responden mempunyai akses, namun setelah mempertimbangkan alasan-alasan rayuan yang dikemukakan

oleh pemohon dengan fakta kes yang responden mempunyai akses" (para 7(ii)). The respondent further stated the basis of rejecting the appeal of the respondent is:

(a) ...

(b) Fakta bahawa Apollo Catering telah didaftarkan di bawah Ordinan Nama-Nama Perniagaan (Cap 64) yang menjalankan perniagaan membekal makanan dan catering.

(c) Aktiviti Apollo Catering di premis yang disediakan oleh kumpulan Samling sebagai tempat masak dan ruang makan merupakan alasan-alasan yang menunjukkan Pemohon menguruskan terhadap tempat-tempat penyediaan dan sajian makanan dan minuman tersebut melalui pekerja dan/atau agen kepada Pemohon.

7.1 In amplification of the abovesaid basis the following facts were considered:

(a) Apollo Catering mengenakan bayaran secara purata sebanyak RM4.50 seorang terhadap pekerja kumpulan Samling atas perkhidmatan menyediakan makanan dan minuman kepada mereka dan pada setiap akhir bulan Apollo Catering mengeluarkan invois-invois yang bertulis "being cost of meals supplied for factory workers for Februari 2001" dan ianya tertulis yang sama bagi bulan-bulan yang seterusnya.

Inbois-inbois daripada bulan Januari 2000, nombor invois 1501 hingga nombor invois 1549 berakhir pada bulan Januari 2001 dan bulan Februari 2000, nombor invois 1551 hingga nombor invois 1590 berakhir pada bulan Disember 2001 dirujuk dan dilampirkan secara kolektifnya sebagai eksibit "A1-1".

(b) Fakta bahawa Apollo Catering telah didaftarkan di bawah Ordinan Nama-Nama Perniagaan (Cap 64) yang menjalankan perniagaan membekal makanan dan catering, pada hakikatnya menunjukkan Pemohon mempunyai pengetahuan berkenaan pengenaan lessen cukai perkhidmatan bagi perniagaan seumpama ini yang telah mencapai 'threshold'.

(c) Fakta menunjukkan Apollo Catering menyediakan dan menyajikan makanan serta minuman di kumpulan Samling dan mendapati para pekerja kumpulan Samling akan datang ke tempat makan dan minum yang disediakan untuk makan dan minum dan seterusnya bertugas dan/atau kerja untuk

A mengendalikan penyediaan dan pembekalan makanan dan minuman serta tempat makan termasuk memasak, menyajikan, membersih dan mengemas meja dan kerusi makan, mencuci pinggan mangkuk, sudu dan garpu semuanya dilakukan oleh pekerja-pekerja Apollo Catering.

B **Findings**

[8] Section 3 of the Act states:

> Service tax shall be charged and levied in accordance with this Act on any taxable service provided by any taxable person.

C

8.1. Section 2 of the Act defines "taxable person" to mean "any person who is prescribed to be a taxable person."

8.2. Regulation 3 of the regulations reads:

D

> The taxable service and taxable person referred to in s. 3 of the Act shall be those set out in the Second Schedule.

8.4. For the purposes of this application it is not disputed that the specific group to be considered is Group C of the Second E Schedule of the regulations as per the decision contained in exh. LTK16.

[9] Group C of the Second Schedule of the regulations reads:

F

Taxable Person	Taxable Service
1. Any person operating one or more restaurants, bars, snack-bars, coffee houses or places which provide food, drinks, or tobacco products, whether wholly eat-in or partly take-away, having a total annual sales turnover, whether combined or singly, of more than RM500,000 of any one or more taxable services mentioned within this Group and located outside a hotel excluding: i. a canteen located in an educational institution; or	a. Provision or sale of food, drinks or tobacco products, b. Provision of services in form of "corkage", "towel charge" or "cover charge c. Provision of premises for meetings or for promotion of cultural or fashion shows, d. Provision of parking spaces for motor vehicles where parking charges are imposed.

G H I

ii. a canteen operated by a religious institution or body	
2. Any person operating one or more food courts and having a total annual sales turnover, whether combined or singly, of more than RM500,000 of any one or more taxable services mentioned within this Group.	

9.1. Before delving into the interpretation of the provision, I am mindful of the legal principles to be adhered in interpreting tax legislations as enunciated by the Supreme Court in *National Land Finance Co-Operative Society Ltd. v. Director General of Inland Revenue* [1993] 4 CLJ 339 at p. 344 g-h (left):

> There are ample authorities to show that Courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. In *Re Micklewait* [1855] 11 Exch 452 it was held that a subject was not to be taxed without clear words. We realize that revenue from taxation is essential to enable Government to administer the country and that the Courts should help in the collection of taxes whilst remaining fair to tax payers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v. I.R.C. (supra)*:
>
> > ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...

(See also other authorities also cited by the respondent – *Controller of Income Tax, States of Malaya v. HKV* [1968] 2 MLJ 260; *Ketua Pengarah Hasil Dalam Negeri v. South Eastern Oceanic Drilling Co SA* [1997] MLJU 105; *Humes Ltd v. The Comptroller of Income Tax Singapore* [1952] 12 MLJ 245).

[10] Reverting to Group C of the Second Schedule of the regulations, learned counsel for the respondent contends that for the purposes of construing "taxable person" there are two limbs to para 1 ie,:

(i) "Any person operating one or more restaurants, bars, snack-bars, coffee-houses";

(ii) "places which provide food, drinks, or tobacco products" having total annual sales turnover of more than the threshold of RM500,000.

Further, learned counsel added that other than the two categories of canteens ie, that located in an educational institution and operated by a religious institution or body being specifically excluded in the category of "taxable person", all other places which provide food and drinks is a "taxable person".

[11] Learned counsel for the applicant submitted that in order to be a "taxable person" under Group C of the Second Schedule Apollo Catering would have to be:

(i) operating,

(ii) (a) a restaurant, bar, snack-bar, coffee house or places which provide food or drinks whether wholly eat-in or partly take-away.

(b) or a food court, and

(iii) where the total annual sales turnover exceeded RM500.000.

[12] I am of the opinion a "taxable person" under Group C of the Second Schedule is:

(i) any person operating:

(ii) (a) one or more restaurants, bars, snack-bars, coffee-houses; or

(b) places which provide food, drinks, or tobacco products, whether wholly eat-in or partly take-away,

(c) a food court as defined in reg. 2 of the regulations;

(iii) where the total annual sales turnover as defined in reg. 2 of the regulations of any one or more taxable services mentioned in Group C whether combined or singly exceeded RM500,000; and

(iv) all the aforesaid persons as described have to be located outside a hotel. (emphasis added)

12.1. The two categories excluded as a "taxable person" is when a person is operating a canteen located in an educational institution or a canteen operated by a religious institution or body.

12.2. I am agreement that the word "or" after the word "coffee-houses" as submitted on behalf of the respondent has to be read disjunctively and in the light of this there is no necessity to resort to the *ejusdem generis* rule as submitted by the learned counsel for the applicant that the "places that provide food or drinks" would mean public places where people could purchase food like restaurants, bars, snack-bars and coffee-houses." In this regard I am of the opinion that the argument of the learned counsel for the applicant that separating para 1 in Group C of the Second Schedule into two limbs in the manner submitted on the respondent's behalf would end up with an interpretation which is untenable because it leaves out the word "operating" cannot be sustained as I have shown earlier that the word "operating" remains unaffected (see para 12(i)). I also agree with the learned counsel for the respondent that the proviso excluding the two categories of canteens lends support that all other places which provide food, drinks, or tobacco products, whether wholly eat-in or partly take-away meeting the other criteria of "taxable person" which I have alluded above is a "taxable person".

[13] Learned counsel for the applicant submitted the word "operating" based on the *The New Shorter Oxford English Dictionary*, vol. 2 at p. 2005 in particular the root word "operate" means "Manage, direct the operation of (a business enterprise, etc)". But it also means "carry on commercial, professional, etc, activities". "Commercial" according to p. 150 The Penguin English Dictionary means "relating to trade or business; organized for profit; designed for, used in trade". Hence this meaning is in tandem with the meaning of "operate" relied on by the learned counsel for the respondent based on the Dewan English-Malay Dictionary at p. 1073 to mean "carry on business, activities, etc, ...". In this regard I do not find the objection raised on behalf of the applicant with regard to the meaning of terms in the English language, that it is often the Oxford Dictionary that is being referred to rather than the English-Malay Dictionary, to be of any significance.

[14] Transposed to the facts of the case, I find there is evidence that at the material time the applicant was registered with the Business Names Ordinance (Cap. 64) as carrying on the business of food and drink catering as per the applicant's letter of notification to the Director of District Office, Miri of the cessation of the applicant's business and the tendering of the original certificate for cancellation as per (exh. LTK1(a) and (exh. LTK1(b)).

14.1. According to s. 8 of the Act "Every taxable person who carries on a business of providing taxable service shall apply to the senior officer of customs in the prescribed form of licence, and no taxable person shall carry on such a business unless he is in possession of a licence issued under subsection 2."

14.2. Regulation 1 of the Second Schedule provides "The persons mentioned under the heading for "Taxable Person in *(inter alia)* Group C of this Schedule providing any taxable service under the heading for Taxable Service in each Group shall apply for a licence."

14.3. Section 9(1) of the Act states "If any taxable person ceases to carry on business he shall forthwith surrender his licence to the Director General".

14.4. Based on the aforesaid provisions referred to, the fact of the registration of the licence and the surrender of the same by the applicant is indicative that the applicant has knowledge that a licence is required for the business of food and catering which has exceeded the threshold of RM500,000.

[15] There is also evidence that the applicant is carrying on the business or the activity of preparing and serving food for breakfast, lunch and dinner for Samling's workers *albeit* at the premises provided by Samling. All the other factors referred in para 3(i), (ii), (iii), (iv), (vii), (viii), (ix) and (x) are irrelevant for the determination of the issue at hand.

[16] In addition, there is evidence the applicant charged a flat rate of RM4.50 per person for the service of preparation of the food and at the end of every month the applicant issued invoices for the service of "cost of meals supplied for factory workers." as per exh. A1-1. It is to be observed that the amount charged by the applicant at the end of each month differed eg, for 31 January

2000 it was RM23,736.50; whilst for 31 March 2000 it was RM25,475.20, RM477, RM605 and RM53.90. For the sake of argument if as the applicant stated it was hired as a contractor to cook food for Samling's workers three times a day, surely the contract sum would be a fixed contract sum; the fact that the amount charged monthly varies negates this assertion; rather it is more consistent with the respondent's contention that the applicant is in fact carrying on the business or activity of a canteen providing food and drink and as the threshold sum of RM500,000 is not in dispute, I find the respondent has shown that the applicant comes within the purview of "taxable person" under Group C in the Second Schedule.

[17] Based on the foregoing reasons I find there is no merit with respect to the applicant's contentions that the respondent has acted in excess of jurisdiction (1st ground) or acted unreasonably in the *"Wednesbury"* sense (2nd ground). Thus the application of the applicant (encl. 1) is dismissed with costs to be taxed unless otherwise agreed.